IN THE

Supreme Court Of The United States

_____ TERM, 1979

NO. 79-451

Marie Frakes ..... *Petitioner*

VS.

Ray Hunt, et al ..... *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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I. OPINIONS BELOW

The majority opinion delivered in the Arkansas Supreme Court is reported at 266 Ark. 171, 583 S.W.2d 497 (1979) and the dissenting opinion of Mr. Justice Fogleman is reported at 266 Ark. 175, 583 S.W.2d 499, both of which are appended to the Petition for a Writ of Certiorari.

II. JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

III. QUESTION PRESENTED

Whether the doctrine enunciated in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31, (1977) should be given retroactive effect.

IV. STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Ark. Stat. Ann. §61-141(d) provides: An illegitimate child or his descendants may inherit real or personal property in the same manner as a legitimate child from such child's mother or her blood kindred; but such child may not inherit real or personal property from his father or from his father's blood kindred.

The first section of Amendment 14 to the Constitution of the United States of America provides: All persons born or nationalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

V. STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct.

VI. REASON FOR DENYING THE WRIT

The question now presented is whether the recent U.S. Supreme Court decision in *Trimble v. Gordon* should be given a retroactive effect and applied to the present case. The U.S. Supreme Court did not state whether *Trimble* is indeed to be applied retroactively. Therefore, the general standards by which the Supreme Court determines retroactivity will resolve this issue.

Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), involved the issue of whether the rule of criminal procedure excluding evidence illegally seized enunciated by *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) applied to cases decided prior to *Mapp*. In holding that it did not, the Court stated:

> The accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective.
>
> * * *
>
> We believe that the *Constitution neither prohibits nor requires retrospective effect.* As Justice Cardozo said, 'we think the federal constitution has no voice upon the subject.' (emphasis supplied)
>
> Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purposes and effect, and whether retrospective operation will further or retard its operation. 381 U.S. 628, 29, 14 L.Ed.2d at 607-8.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), a civil case, the plaintiff had been injured while working on an oil derrick off the Gulf Coast of Louisiana in 1965, and filed suit three years later. After suit was filed the Supreme Court decided in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969), that a one-year statute of limitations, rather than the admiralty principle of laches, applied. However, the U.S. Supreme Court held that *Rodrigue* should not be applied retroactively to bar actions filed before its announcement. In its opinion, the Supreme Court categorized the rules for retroactivity into three separate factors as follows:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation'. Finally, we have weighed the inequity imposed by retroactive application, for, "(w)here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." 404 U.S. at 106-07, 30 L.Ed.2d at 306.

In *Lemon v. Kurtzman*, 411 U.S. 192, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973), the Court held that although payments to private sectarian schools were unconstitutional, payments made before they were ruled unconstitutional

would not have to be reimbursed, because of the school's actions taken in expectation of reimbursement. The Court stated its recognition that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct."

In the case of *Rebsamen Motors, Inc. v. Morris*, 229 Ark. 483, 317 S.W.2d 141 (1958), the issue was whether an installment note charging interest on a "time price differential" was usurious even though executed prior to a *caveat* given in *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952). The court held that it was not, because the *Hare* decision had overruled a long line of decisions and was therefore intended to apply prospectively only. And in *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968), the Arkansas Court stated:

> That possible hardship on those who have justifiably relied upon the law as announced by the Court in the past stems from the retroactive effect normally given a court decision. Legislative acts which normally operate only in the future avoid this effect. It is for this reason that many of the courts have left such problems for legislative solution. *Whittington v. Flint*, 43 Ark. 504 (1884). In the past we have met the problem by making our decisions operative only in the future. *Hare v. General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973 (1952). 244 Ark. at 1253, 429 S.W.2d at 52.

Wawack v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970) further imbedded into Arkansas case law the principle of nonretroactivity for cases where injustice would result from applying an entirely new law retrospectively:

> To sum up, upon the facts before us in the case at bar we have no hesitancy in adopting the modern rule by which an implied warranty may be recognized in the sale of a new house by a seller who was also the builder. That rule, however, is a departure from our earlier cases; so, to avoid injustice, we adhere to the doctrine announced in *Parrish v. Pitts, supra*, by which the new rule is made applicable only to the case at hand and to causes of action arising after this decision becomes final. 248 Ark. at 1100, 449 S.W.2d at 926.

That the new rule of law established by *Wawack* acted only prospectively to prevent injustice was again emphasized in *Leffler v. Banks*, 251 Ark. 277, 472 S.W.2d 110 (1971), where the *Wawack* rule was not applied to a home sale occurring before *Wawack* was announced.

In summary, the Arkansas court has clearly held that decisions will not be applied retroactively where they overrule a long line of cases, or state a new rule of law. In so holding, the Court has considered the equities of a given case. Thus, its approach is quite similar to the United States Supreme Court's approach in constitutional law cases.

An initial question under the law discussed above is whether *Trimble* has established a new principle of law. It is clear that it has. In *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971), the United States Supreme Court held that (1) Louisiana's statutory scheme, barring an illegitimate child who had been acknowledged but not legitimated from sharing equally with legitimate heirs in the father's estate, had a rational basis in view of the state's interest in promoting family life and of directing the disposition of property left within the state, and (2) such statutory scheme did not constitute an invidious discrimination against illegitimate children in violation of

the due process and equal protection clauses. Therefore, the illegitimate child was not allowed to inherit. The Court distinguished the earlier case of *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), where it was stated that laws discriminating against illegitimate children were unconstitutionally suspect, on the basis that *Levy* was a tort action where the illegitimate child had clearly been injured by his mother's wrongful death. In *Labine*, in contrast, the statutes in issue were inheritance statutes, and the Court clearly stated:

> (T)he choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. 401 U.S. at 537, 28 L.Ed.2d at 293.

Although the Court in *Trimble* partially distinguished *Labine*, it did admit "...it is apparent that we have examined the Illinois Statute more critically than the Court examined the Louisiana Statute in *Labine*."

A second important question is what is the purpose of the new rule, and will retroactive application further or retard this purpose. The purpose of *Trimble* is to limit statutory discrimination against illegitimates in matters of intestate succession. However, the opinion recognizes the *substantial state interest* in providing for the stability of land titles and the prompt and definitive determination of the valid ownership of property left by decedents. Thus, these two potentially adverse interests must be balanced in determining whether the *Trimble* decision is to be applied retroactively. Respondents strongly urge that because of

the importance of protecting vested property rights, and because of the confusion which would result from retroactive application, the purpose of *Trimble*, *i.e.*, to protect rights of illegitimates while not unduly compromising state interests in orderly intestate succession, will not be fulfilled by retroactive application.

A third crucial question is whether it would be inequitable to apply *Trimble* to the present case. Petitioner argues that *Trimble* should be applied to her case because Respondents did not rely on the prior status of the law. In so arguing, Petitioner overlooks the fact that Respondents have a vested property right in the real property comprising Linn Hunt's estate. It has been held that where vested property rights are concerned, reliance upon the former law need not be shown, but will be presumed. *Continental Supply Co. v. Abell*, 95 Mont. 148, 24 P.2d 133 (1933); *Rice v. Graves*, 273 N.Y.S. 582, aff'd. 200 N.E. 288 (N.Y. 1936).

Under Ark.Stat.Ann. §61-131, 137 (Cum.Supp. 1977), the heirs of a deceased succeed by inheritance to the ownership of his real property immediately upon his death. This is the general rule in Arkansas and elsewhere, since early vesting of property rights is favored. *McLaren v. Cross*, 236 Ark. 648, 370 S.W.2d 59 (1963); *Cross v. Pharr*, 215 Ark. 463, 221 S.W.2d 24 (1949); *Pfaff v. Heizman*, 218 Ark. 201, 235 S.W.2d 551 (1951).

The Arkansas case of *Dean v. Brown*, 216 Ark. 761, 227 S.W.2d 623 (1950) is very much in point. The issue was whether nieces and nephews of an intestate should be divested of title to her real estate by an adopted child of the intestate. The adoption was invalid because of minor

technical problems. Shortly after the intestate's death, a new legislative act became effective which prohibited attack on an adoption decree after two years. The adopted child argued that this statute should be applied retroactively so that she would inherit the property. The Court denied her claim, stating:

> In the case at bar, the title to the real estate of Mrs. Eva Crawford Priddy vested in the appellees, as her heirs at law, immediately upon her death on February 2, 1947, subject to the husband's courtesy if he was alive; and the Act 408 of 1947 was not adopted until March 28 following. It therefore could not retrospectively operate to divest appellees' title to the real estate of Mrs. Priddy. So, as regards the real estate, the appellant cannot prevail. 216 Ark. at 769.

Similarly, in *Anderson v. Webb*, 241 Ark. 233, 406 S.W.2d 871 (1966), the Court held that property rights already vested should not be divested by retroactive application of legislation. And in *Cupp v. Frazier's Heirs*, 239 Ark. 77, 387 S.W.2d 328 (1965), the Court held that it would not overrule a case involving a rule of property retroactively, but only as to future cases.

The California Court in *County of Los Angeles v. Faus*, 312 P.2d 680 (Cal. 1957) stated the general rule that a decision of the court of supreme jurisdiction overruling a former decision is retrospective, and that the former decision is considered to have never been the law. However, "where a constitutional provision or statute has received a given construction by a court of last resort and contracts have been made or property rights acquired under and in accordance with its decision, such contracts will not be invalidated nor will vested rights acquired under the decision be impaired by a change of construction adopted in

a subsequent decision." Under those circumstances it has been the rule to give prospective, and not retrospective, effect to the later decision. 312 P.2d at 685.

It is clear that Respondents' property rights in Linn Hunt's estate vested at the time of his death, which was in 1972, and in accordance with the laws in effect at the time of his death, which would include Ark.Stat.Ann. §61-141. At the time Linn Hunt died, the Petitioner simply was not his heir under the laws of the State of Arkansas. It is reasonable to suppose that Linn Hunt expected and intended that his property would descend in accordance with the law in effect in 1972. If *Trimble* had been decided before his death, he might well have made a will specifying his heirs.

Furthermore, for nearly seven years, the heirs of Linn Hunt have lived and acted under the assumption that they were the owners of a large and valuable parcel of real property. It must be presumed that their belief has caused them to take certain actions and to refrain from taking other actions. This factor is undoubtedly why, as indicated above, reliance upon the former law with regard to real property rights is presumed.

The Supreme Court of Kentucky has considered whether the *Trimble* decision should be applied retroactively in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1978). The Court decided that its own statute with regard to inheritance by illegitimates was unconstitutional and invalid, but as to the retroactive effect of this holding, the Court stated:

This opinion shall have no retroactive effect upon the devolution of any title occurring before April 26, 1977 (the date of the *Trimble* opinion), except for those specific instances in which the dispositive constitutional issue raised in this case was then in the process of litigation. 560 S.W.2d at 539.

CONCLUSION

It is respectfully submitted that the *Trimble* decision should not be given retroactive effect to an estate and property rights thereunder vesting more than six years ago. Another case might involve the estate of a decedent who died ten, twenty or forty years ago. Application of *Trimble* to old estates would obviously create chaos in land titles. On the contrary, it should apply only to estates of decedents dying after the date of the *Trimble* decision. Up until that time, as was discussed in an earlier portion of this brief, the recent decisions of the United States Supreme Court clearly held that illegitimates could be discriminated against in inheritance statutes. It would be in the best interest of Arkansas, the citizens of Arkansas, and the citizens of the United States to apply *Trimble v. Gordon* prospectively only.

It is respectfully submitted that Arkansas and other states be allowed to determine the proper application of *Trimble* based upon vested property rights and resulting injustices.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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